

BEFORE THE
Federal Communications Commission **RECEIVED**
WASHINGTON, D.C.

JUN 7 1996

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment to the Commission's Rules)
Regarding a Plan for Sharing)
the Costs of Microwave Relocation)

WT Docket 95-157
RM-8643

DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

Andrea D. Williams
Assistant General Counsel

**CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

Philip L. Verveer
Jennifer A. Donaldson
WILLKIE FARR & GALLAGHER
1155 21st Street, N.W., Suite 600
Three Lafayette Centre
Washington, D.C. 20036-3384

Of Counsel

June 7, 1996

No. of Copies rec'd 024
List ABCDE

SUMMARY

INCUMBENTS PRESENT NO COMPELLING REASONS WHY THE VOLUNTARY NEGOTIATION PERIOD CANNOT BE REDUCED BY ONE YEAR FOR BROADBAND PCS BLOCKS C-F

- The fact that the status quo is working in a large majority of cases does not remove the need to refine the rules if a few "bad actors" retain the ability to significantly impede the development of PCS. So long as incumbents are not harmed by such finetuning, it is the equitable solution.
- Incumbents appear to equate a reduction in the voluntary negotiation period with an accelerated obligation on their part to vacate their spectrum, thus resulting in possible harm to their operations or frustration of their business plans. Contrary to these assertions, incumbents still have the same timeframe in which to move, that is, the overall voluntary/mandatory negotiation period (3-5 years) remains the same. Only their obligation to begin negotiating in good faith is accelerated. Thus, their networks and business plans are not harmed in any cognizable manner.
- Incumbents lose no privileges they would otherwise be entitled to by a stepped-up mandatory negotiation period. They are still entitled to a full recovery of costs, as well as any properly negotiated incentives to relocate, whether under the voluntary or the mandatory negotiation period.
- The fact that prospective broadband PCS C-F block licensees have prior notice of the current relocation plan does not render the current negotiation system fair as a legal proposition. Section 332(a) of the Communications Act obligates the Commission to take actions in managing mobile services spectrum which, among other things, promote efficiency of spectrum use, reduce regulatory burdens, encourage competition, and promote the safety of life and property. To the extent that the current plan delays the introduction of PCS, it imposes harmful costs to society in terms of efficiency losses and decreased competition, contrary to the provisions of Section 332(a).
- Finally, reduction of the voluntary period will encourage, not discourage, voluntary negotiations, consistent with the Commission's intentions.

TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY	ii
I. INTRODUCTION	1
II. NOTWITHSTANDING INCUMBENT OBJECTIONS, THE COMMISSION SHOULD DECREASE THE VOLUNTARY NEGOTIATION PERIOD BY ONE YEAR FOR PCS BLOCKS C-F	2
III. CONCLUSION	8

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Amendment to the Commission's Rules)	WT Docket 95-157
Regarding a Plan for Sharing)	RM-8643
the Costs of Microwave Relocation)	

**COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA"),¹ hereby submits its Reply Comments in the above-captioned proceeding.²

I. INTRODUCTION

CTIA favors shortening the voluntary negotiation period for broadband PCS blocks C-F by one year and increasing the mandatory negotiation period accordingly.³ A reduction in the voluntary

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including cellular, personal communications services ("PCS"), enhanced specialized mobile radio, and mobile satellite services.

² Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rule Making in WT Docket 95-157, RM-8643, FCC 96-196 (released April 30, 1996) ("Notice").

³ CTIA also favors imposing a requirement for "good faith" negotiation to commence in the voluntary period under certain circumstances. That is, during the voluntary period, while incumbents are not obligated to commence

negotiation period will help to ensure the more timely introduction of additional wireless services, without harming the legitimate interests of incumbent licensees. Because incumbents are entitled to adequate notice and cost recovery at all phases in the negotiation process, they will not suffer undue harm by a shortening of the voluntary period.

The objections presented by incumbent licensees to the proposed reduction of the voluntary period, as reflected in their comments, are unpersuasive. Given that the risks to competition, economic efficiency, and consumer welfare from applying the current scheme to C-F block PCS relocation are very real, the Commission should shorten the voluntary negotiation period.

II. NOTWITHSTANDING INCUMBENT OBJECTIONS, THE COMMISSION SHOULD DECREASE THE VOLUNTARY NEGOTIATION PERIOD BY ONE YEAR FOR PCS BLOCKS C-F

Incumbents who favor retention of the status quo offer several reasons for their proposal, none of which CTIA finds convincing, either viewed separately or as a whole. Incumbents variously claim that:

- (1) the current rules reflect the careful balancing of competing interests; because they are currently working in a large majority of cases, modification is unnecessary;
- (2) incumbents have relied on the status quo in making budgetary and other decisions; a disruption of the current regime midstream will provide incumbents with insufficient time to respond quickly and adequately to PCS carrier proposals or to consummate negotiations with PCS carriers;
- (3) shortening the voluntary period may harm or disrupt public safety and other critical telecommunications services;

negotiations, once they do so, both parties should be obligated to conduct all negotiations in "good faith."

(4) PCS licensees subject to a shorter voluntary period than their A and B block counterparts will have an unfair advantage; incumbents will have a reduced ability to request financial reimbursement in exchange for prompt relocation;

(5) PCS licensees have taken the costs of the current rules into account in their original bids so they are not harmed by the status quo;

(6) PCS licensees and/or incumbents may nullify the voluntary period by refusing to negotiate until the one year voluntary period has elapsed; and

(7) a change in the basic structure or length of the negotiation period as contemplated in the Notice would be inconsistent with the Commission's objectives to encourage voluntary negotiations and arbitration and mediation to resolve disagreements regarding microwave relocation.⁴

Notwithstanding incumbent claims that the status quo is largely successful in quickly relocating incumbents, unfortunately some "bad actors" are abusing the process by demanding improper premiums.⁵ The fact that only a small percentage of incumbents are engaging in abusive conduct does not lessen their disruptive impact. Unfortunately, it takes only one bad actor in several key markets to substantially hamper the buildout efforts of many PCS licensees. It is clear from the experience gained in the A and B block negotiation process that

⁴ See, e.g., American Petroleum Institute Comments; American Public Power Association Comments; APCO Comments; Association of American Railroads Comments; Los Angeles County Sheriff's Department and the County of Los Angeles, Internal Services Department Comments; Tenneco Energy Comments; UTC Comments; and Williams Wireless, Inc. Comments.

⁵ Based upon information provided to us, CTIA has documented those cases in which the amount requested by the incumbent to recover its relocation costs grossly exceeds a reasonable estimate of the per-link costs to relocate under the cost-sharing plan. The numbers speak for themselves.

additional fine-tuning is in order. Shortening the voluntary negotiation period should help to curb the improper actions of certain incumbents, without harming the majority of good actors.

Moreover, alteration of the current negotiation process as contemplated in the Notice will not detrimentally affect microwave incumbents by interfering with their business plans or harmfully disrupting their current operations. Incumbents appear to equate a reduction in the voluntary negotiation period with an accelerated obligation on their part to vacate their spectrum. This is not the case. Incumbents still have the same timeframe in which to move, that is, the overall voluntary/mandatory negotiation period (3-5 years) remains the same even with the reduction of the voluntary negotiation period by one year. While the requirement to negotiate in good faith is accelerated, there is no concomitant compulsion to vacate the spectrum under either the voluntary or the mandatory periods until satisfactory negotiations have concluded. Thus, their networks and business plans are not harmed in any cognizable manner by the reduction of the voluntary period.

On a related note, incumbents lose no privileges they would otherwise be entitled to by a stepped up mandatory negotiation period. Under either period, they are still entitled to a full recovery of costs, as well as any properly negotiated incentives to relocate. While several commenters intimate that a shorter voluntary period for C-F block PCS licensees is somehow unfair to A/B block licensees, upon close examination, their concern is rather self-interested. Incumbents raising this argument

correctly note that with the passage of time their ability to extract, via the negotiation process, additional financial reimbursement as an added incentive to relocate quickly, is diminished. But this observation holds regardless of whether the relevant negotiation period is voluntary or mandatory as the actual passage of time is the relevant indicator of the value attached to relocation. To the extent that incumbents raise such an argument in the belief that their ability to extract premiums should be a protected interest, the D.C. Circuit has already found otherwise.⁶

Another argument raised by some incumbents is that prospective and current PCS licensees have full knowledge of the current negotiation process and have factored (or will factor) such obligations into their bids. Apparently, the argument continues, that, because PCS carriers have prior knowledge of the rules, they cannot be harmed by them, nor is there any Commission

⁶ See Ass'n of Public-Safety Communications Off'als-Int'al, Inc. v. FCC, 76 F3d 395, at note 5 (D.C. Cir. 1996) (D.C. Circuit upheld FCC's decision to require public safety incumbents to be subject to relocation; "Under the original program exempting public safety providers from forced relocation, the petitioners would likely have enjoyed substantial leverage in their voluntary negotiations with PCS providers. Any PCS licensee whose services can only operate in clear spectrum would be forced to pay extraordinary costs, or 'rents,' to the incumbent, since the PCS operator's license could be rendered virtually useless by an incumbent's refusal to relocate voluntarily. While the petitioners undoubtedly have a significant financial interest in protecting the ability to exact such payments, their loss of rent-seeking potential is hardly a cognizable injury for consideration either by the FCC or by this court since their place on the spectrum was originally derived from a grant from the government.")

obligation to change them. This does not make sense as a policy matter, and is also contrary to the Commission's Communications Act obligations.⁷

The mere fact of prior knowledge does not equate to fairness. Under Section 332(a) of the Communications Act of 1934, as amended,⁸ the Commission is obligated, in managing the mobile services spectrum, to promote efficiency of spectrum use, reduce regulatory burdens, encourage competition, and promote the safety of life and property.⁹ Delays in the introduction of PCS impose real costs on society in terms of competition, dynamic efficiency, and ultimately consumer welfare. Society, not just

⁷ As a legal proposition, it is within the Commission's authority and current practice to revisit and revise its rules in recognition of the problems raised in putting a theoretical model into practice. See, e.g., Geller v. FCC, 610 F2d 973, 979 (D.C. Cir. 1979) ("the agency cannot sidestep a re-examination of particular regulations when abnormal circumstances make that course imperative"); WWHT, Inc. v. FCC, 656 F2d 807, 819 (D.C. Cir. 1981) ("an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed").

⁸ 47 U.S.C. § 332(a).

⁹ Specifically, Section 332(a) provides: "a) In taking actions to manage the spectrum to be made available for use by the private [non-government] mobile services, the Commission shall consider, consistent with section 1 of this Act [47 U.S.C. § 151], whether such actions will- (1) promote the safety of life and property; (2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands; (3) encourage competition and provide services to the largest feasible number of users; or (4) increase interservice sharing opportunities between private mobile services and other services.

PCS providers, benefits by the rapid introduction of additional PCS services. Such benefits include increased competition, which results in lower prices and more choices for consumers. When one factors possible dynamic efficiency losses into the equation, combined with the Commission's Section 332(a) obligations, a shorter negotiation period is proper.


Finally, contrary to the claims of some incumbent commenters, reduction of the voluntary period will encourage, not discourage, voluntary negotiations, consistent with the Commission's intentions. By accelerating the voluntary period, incumbents must come to the negotiation table more quickly and must negotiate in good faith. This means that their obligation to look for mutually acceptable solutions to unacceptable interference is accelerated. This also means that incumbents will no longer be able to refuse to deal, or to demand outrageous premiums as a condition precedent to relocation. The loss of these abilities should only encourage voluntary negotiations, not discourage them.

III. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission reduce the voluntary negotiation period between PCS providers and incumbent microwave licensees by one year for broadband PCS blocks C-F.

Respectfully Submitted,

**CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**


Andrea D. Williams
Assistant General Counsel

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

Philip L. Verveer
Jennifer A. Donaldson
WILLKIE FARR & GALLAGHER
1155 21st Street, N.W., Suite 600
Three Lafayette Centre
Washington, D.C. 20036-3384
(202) 328-8000

Of Counsel

June 7, 1996

10350.01